STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL SIMPSON,

Defendant-Appellant.

UNPUBLISHED
November 18, 1997

No. 185484
Kent Circuit Court
LC No. 94-0205-FC

Before: Saad, P.J., and Neff and Reilly, JJ.

PER CURIAM.

The jury convicted defendant of one count of criminal sexual conduct in the first degree, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and one count of criminal sexual conduct in the second degree, MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). The court sentenced defendant as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to imprisonment of seventeen and a half to fifty years for the conviction of criminal sexual conduct in the first degree and ten to twenty-five years for the conviction of criminal sexual conduct in the second degree. Defendant appeals as of right. We affirm in part and reverse and remand in part.

During the trial, two witnesses testified that the defendant had committed criminal sexual conduct in the second degree against them while they were at the defendant's home. In a pretrial motion, defense counsel claimed that this evidence was being offered merely to show the defendant's propensity to commit the wrongful act. The trial court found that the evidence was admissible in order to show unlikely coincidence, modus operandi and/or a common plan, scheme or system. In addition, the court held that the evidence was admissible with respect to both counts, sexual penetration and sexual contact, even though the two witnesses alleged only sexual contact.

I

Defendant contends that the trial court deprived him of his due process rights by allowing certain witnesses to testify as to his prior bad acts. Defendant says that the prosecutor failed to show that the testimony's probative value outweighed its inherently prejudicial character. Alternatively, defendant claims that even if the prior bad act evidence is determined to be relevant, the trial court erred in refusing

to limit its use to the count of criminal sexual conduct in the second degree. We hold that the prior bad act evidence is relevant for the purpose of showing intent, modus operandi, unlikely coincidence, common plan, scheme or system, and lack of mistake or accident. However, we hold that this bad act evidence is only relevant to the charge of criminal sexual conduct in the second degree.

As to the count of criminal sexual conduct in the second degree, the prior bad acts evidence satisfies the standard previously clarified by this court: first, the evidence was offered for a proper purpose; second, the evidence was relevant; third, the probative value of the evidence was not outweighed by unfair prejudice; fourth, the trial court did provide a limiting instruction for the jury. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993). The testimony of the two witnesses, as stated above, was not offered by the prosecution to show the defendant's criminal propensity, but rather for the purpose of showing intent, modus operandi, unlikely coincidence, common plan, scheme or system, and lack of mistake or accident. MRE 404(b) is an inclusionary, rather than exclusionary rule. That is, relevant "other bad acts" evidence does not violate MRE 404(b) unless it is offered *solely* for the purpose of showing that the defendant has a criminal propensity and that he acted in conformity therewith. *Id*. at 64-65.

Furthermore, this defendant was charged with a count of criminal sexual conduct in the second degree, to which he responded with a general denial of guilt. Sexual purpose is an element of such an offense, and thus, the bad acts evidence is relevant to intent under the theory of improbability as long as the testimony is sufficiently similar to the charged conduct. *Id*. at 85. Here, we hold that the three incidents of sexual assault were sufficiently similar, and thus relevant, because all three women were fondled while the defendant was in a position of authority over them.

Additionally, defense counsel argues that the prior bad acts evidence was far more prejudicial than probative. We disagree. The prior bad acts evidence given by the witnesses was not nearly as shocking as the testimony given by the current victim (defendant's daughter) who testified that the defendant not only subjected her to unwanted sexual contact, but also repeatedly forced her to have intercourse with him. This is in stark contrast to other cases where this Court has ruled that extremely prejudicial evidence of prior acts was inadmissible. In *People v Starr*, 217 Mich App 646; 553 NW2d 25 (1996), we ruled inadmissible prior act evidence regarding uncharged conduct that the defendant had repeatedly raped his half sister from age four to eighteen. Certainly, the prior act evidence offered in this case was not nearly as inflammatory. In *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996), we found prior act evidence to be inadmissible because the prosecutor offered such evidence specifically to show that the defendant had a bad character. This is in contrast with the present case where the prior act evidence was offered to show intent, modus operandi, unlikely coincidence, common plan, scheme or system, and lack of mistake or accident, and where the trial court ruled that the evidence was admissible.

Additionally, the trial court gave the jury a proper cautionary instruction regarding the limited admissibility of the bad acts evidence:

> You have heard some evidence in this trial that was introduced tending to show that the defendant may have committed other improper acts at prior times for which he

> is not presently on trial. If you believe this evidence, you must be careful only to consider it for certain limited purposes. You may only think about whether this evidence tends to show that the defendant used a plan, system, or characteristic scheme that he has used before or since, or to demonstrate the so-called modus operandi of the defendant as its sometimes called, or for purposes of demonstrating the Prosecutor's theory of unlikely coincidence, or finally, as to the second Count of the Information charging Criminal Sexual Conduct in the Second Degree, for the purpose of demonstrating that the defendant meant to engage in a criminal act in the present case, with the intent to achieve, thereby, sexual gratification. This is evidence is [sic] therefore received by the Court only for those limited purposes and you must not consider this evidence for any other purpose.
>
> For example, you must not decide that this evidence shows that the defendant is a bad person, or that he is likely to commit crimes. You must not convict the defendant here in this case of the charges now before you because you think he may be guilty of some other bad conduct at some prior time. All the evidence in the trial must convince you beyond a reasonable doubt that the defendant committed the crimes that are charged in these proceedings, or you must find him not guilty.

This instruction cured any error that might have been created due to the prejudicial nature of the prior bad acts evidence.

II

Defendant also contends that the trial court erred by allowing the admission of a letter from the complainant's grandmother because the letter constituted improper hearsay testimony which bolstered the complainant's version of events. Defendant further claims that the prosecutor's use of the hearsay evidence during closing argument denied his right to a fair trial. Defense counsel did not object to the admission of the letter at trial or the comments of the prosecutor during closing argument, and hence, this issue is not properly preserved for appeal. Furthermore, we hold that our refusal to consider this issue will not result in manifest injustice for the following reasons. First, assuming that the letter should not have been admitted because it was improper hearsay, we do not believe that the evidence was so prejudicial that it would have affected the outcome of the trial due to its ambiguous nature. Second, the prosecutor's remarks concerning the letter were not improper because they were made in response to comments made by defense counsel during closing arguments. The prosecutor was merely responding to defense counsel's interpretation of the letter. Accordingly, we find no manifest injustice by reason of the trial court's allowance of the challenged letter into evidence, or the prosecutor's reference to it in rebuttal closing argument.

III

Defendant also claims that improper comments made by the prosecutor during closing arguments denied him a fair trial. Defendant did not object to any of these allegedly improper comments during the trial. Therefore, our review is precluded absent a miscarriage of justice. *People v*

Stanaway, 446 Mich 643, 687; 521 NW2d 557 (1994), *cert den sub nom Michigan v Caruso*, 513 US 1121; 175 S Ct 923; 130 L Ed2d 802 (1995). Defendant's strongest claim of error concerns the comments that the prosecutor made allegedly calling attention to the fact that the defendant failed to testify. Certainly, a defendant in a criminal case has the absolute right not to testify, and any abridgment of this right would result in a miscarriage of justice. However, upon reviewing the comments of the prosecutor, we conclude that although she came close to crossing the line between asking the jury to believe the complainant and calling attention to the fact that the defendant failed to testify, her primary focus remained the credibility of the complainant. This issue of credibility was crucial because the defense counsel's primary claim to the jury was that the complainant was lying. A prosecutor may argue that a witness should be believed. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Furthermore, a miscarriage of justice will not be found if the prejudicial effect of the comments could have been cured by a curative instruction to the jury. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). After reviewing the alleged prosecutorial misconduct, we find that any misconduct that may have occurred and which may have resulted in prejudicial effect was cured by the trial court's final instructions to the jury:

> Every defendant has the absolute right not to testify. When you decide the case you must not consider the fact that the defendant did not testify. It must not affect your verdict in any way.

IV

Defendant finally claims that even if the individual errors, considered separately, do not constitute error requiring reversal, the cumulative effect of the errors warrants reversal in this case. We hold that the cumulative effect of the alleged instances of error does not require reversal of the defendant's conviction for criminal sexual conduct in the second degree. Because the admission of the bad acts evidence with regard to the charge of criminal sexual conduct in the first degree, standing alone, constituted error warranting reversal, it is not necessary to consider the cumulative effect of the alleged errors on the conviction for criminal sexual conduct in the first degree. Therefore, defendant's conviction for criminal sexual conduct in the second degree is affirmed, and defendant's conviction for criminal sexual conduct in the first degree is reversed and the charge of CSC I is remanded for new trial. We do not retain jurisdiction.

Affirmed in part; reversed and remanded in part.

/s/ Henry William Saad
/s/ Janet T. Neff
/s/ Maureen Pulte Reilly